Public Prosecutor v Romanus Clement Ungkin & Anor

HIGH COURT (LABUAN) — CRIMINAL APPEAL NO K–42–12 OF 2003
SULONG MATJERAIE J
4 AUGUST 2005

Criminal Law — Corruption — Whether trial judge had rightly entertained doubts on prosecution's case — Anti-Corruption Act 1997 s 11(a)

Criminal Procedure — Appeal — Appellate court, power and duty of — Duty of appellate court — Court must be slow to disturb findings of trial judge unless such findings were plainly wrong or against weight of evidence

The two respondents were at the material time, police officers: the first respondent being a Lance Corporal, L/Cpl Romanus Clement Ungkin ('Romanus') and the second respondent being an Inspector, Insp Rechi a/k John Chuhing ('Rechi'). In the sessions court, Romanus faced two charges under s 11(a) of the Anti Corruption Act 1997 ('the Act'). The first was against him alone while in the second charge he was charged jointly with Rechi. Romanus was convicted on the first charge and was sentenced to 14 days imprisonment and a fine of RM10,000 in default six months imprisonment. Both Romanus and Rechi were 'discharged and acquitted' on the second charge. The public prosecutor appealed to the High Court.

Held, dismissing the appeal:

(1) In this instant case not only did the learned sessions court judge entertained serious doubts but the reply made by Rechi was acceptable to her. It could be seen here that although it was the contention that the prosecution had proved its case beyond any reasonable doubt, the sessions court judge did not share this view. She entertained doubts and it had been explained why and was based substantially on the credibility of witnesses called. Such being the case, this court must be slow to disturb the findings of a trial judge unless such findings were plainly wrong or against the weight of evidence (see para 13).

(2) The court was unable to find anything to substantiate the allegation that a RM100 bill was found on the second respondent during a search done by Anti Corruption Agency ('ACA') (see para 17).

(3) The sessions court judge was entitled to entertain doubts as to whether the first prosecution witness ('PW1') had written on a piece of paper the serial numbers of the notes ('P6') before he purportedly handed over the notes of RM740 to either one of the respondents (see para 18).

(4) The learned sessions court judge had rightly entertained doubts in respect of RM740 bearing in mind that Rechi had flatly denied receiving

any money from PW1 in the taped conversation. This matter was made more difficult when the learned DPP herself was unsure of the facts of her own case (see para 42).

(5) The sessions court judge had rightly considered the point that a statutory presumption could only be invoked upon proving the matter that invokes the presumption. The sessions court judge was not satisfied that the prosecution had proved that PW1 had given the impugned RM740 to either one of the respondents, therefore the statutory presumption could not be invoked (see para 46). The learned sessions court judge was correct in holding that the presumption under s 42 of the Act could not be invoked in this case as the prosecution had failed to prove the condition precedent in order to invoke the said presumption, i.e. that either the respondent had received the impugned RM740 (see para 49).

[**Bahasa Malaysia summary**

Kedua responden-responden merupakan pada masa material, pegawai polis: responden pertama yang berpangkat Lans Koperal adalah L/Kpl Romanus Clement Ungkin ('Romanus') dan responden kedua yang berpangkat Inspektor adalah Insp Rechi a/k John Chuhing ('Rechi'). Dalam mahkamah sesyen, Romanus menghadapi dua pertuduhan di bawah s 11(a) Akta Pencegahan Rasuah 1997 ('Akta itu'). Pertuduhan yang pertama adalah terhadap Romanus manakala dalam pertuduhan kedua Romanus dituduh bersama Rechi. Romanus didakwa atas pertuduhan pertama dan dihukum penjara selama 14 hari bersama dengan denda sebanyak RM10,000 sekiranya gagal dipenjarakan selama enam bulan. Kedua-dua Romanus dan Rechi telah 'dilepas dan dibebaskan' atas pertuduhan kedua. Pendakwa raya telah merayu kepada Mahkamah Tinggi.

Diputuskan, menolak rayuan itu:

(1) Dalam kes ini, hakim mahkamah sesyen bukan sahaja melayani keraguan yang serius malah pembalasan yang dibuat oleh Rechi juga diterima olehnya. Ia boleh dilihat di sini bahawa walaupun apa yang dinyatakan adalah pihak pendakwaan telah membuktikan kes tanpa keraguan munasabah, hakim mahkamah sesyen tidak berpendapat sedemikian. Beliau melayan keraguan dan memberi sebabnya dan ia berdasarkan kredibiliti saksi yang dipanggil. Dalam keadaan ini, mahkamah ini tidak sepatutnya campur tangan dengan penemuan hakim mahkamah pembicaraan kecuali jika penemuan itu adalah jelas salah atau bercanggah dengan keterangan (lihat perenggan 13).

(2) Mahkamah tidak dapat mengesahkan tuduhan bahawa sekeping RM100 dijumpai pada responden kedua semasa carian/penggeledahan dibuat oleh Badan Pencegah Rasuah ('BPR') (lihat perenggan 17).

(3) Hakim mahkamah sesyen berhak untuk melayan keraguan mengenai sama ada saksi pendakwaan pertama ('PW1') telah menulis di atas sekeping kertas nombor siri kepingan wang ('P6') sebelum beliau memberi kepingan wang RM740 kepada salah seorang daripada responden (lihat perenggan 18).

(4) Hakim mahkamah sesyen adalah betul dalam melayan keraguan mengenai RM740 dengan mengambil kira bahawa Rechi telah dengan secara nyata menafikan bahawa beliau menerima sebarang wang daripada PW1 di dalam percakapan yang direkodkan. Perkara ini disusahkan lagi apabila DPP sendiri tidak pasti dengan fakta kesnya sendiri (lihat perenggan 42).

(5) Hakim mahkamah sesyen adalah betul dalam mengambil kira bahawa anggapan statutori hanya boleh digunakan setelah membuktikan perkara yang boleh menggunakan anggapan itu. Hakim mahkamah sesyen tidak puas hati bahawa pendakwaan telah membuktikan PW1 telah memberikan RM740 kepada mana-mana satu responden dan maka anggapan statutori tidak boleh diguna pakai. Hakim mahkamah sesyen betul dalam penghakimannya bahawa anggapan di bawah s 42 Akta itu tidak boleh diguna pakai dalam kes ini kerana pendakwaan telah gagal membuktikan syarat terdahulu untuk mengunapakai anggapan itu, iaitu bahawa mana-mana satu responden telah menerima RM740 itu (lihat perenggan 49).]

Notes

For cases on power and duty of appellate court, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 176–239.

Cases referred to

Attan bin Abdul Gani v PP [1969] 1 LNS 112 (refd)
Dato' Seri Anwar Ibrahim v PP [2002] 3 MLJ 193 (refd)
Dyca ak. Rawing v PP [1998] 1 LNS 345 (refd)
Jumari bin Mohamed v PP [1982] 1 MLJ 282 (refd)
Mat v Public Prosecutor [1963] MLJ 263 (refd)
Ng Kim Huat v PP [1961] MLJ 308 (refd)
Periasamy s/o Sinnappan v Pendakwa Raya [1996] 2 MLJ 557 (refd)
PP v Abdul Rahman Mohamad [2005] 1 CLJ 700 (refd)
PP v Datuk Haji Harun bin Haji Idris (No 2) [1977] 1 MLJ 15 (refd)
Public Prosecutor v Ooi Seng Huat [1968] 2 MLJ 168 (refd)
Veerasingam v PP [1957] 1 LNS 93 (refd)
Zabidi bin Morad v PP [2003] MLJU 607 (refd)

Legislation referred to

Anti Corruption Act 1997 ss 5(1), (2), (2)(b), 11(a), 14, 42(1)
Penal Code s 34

Afizi bin Othman (Deputy Public Prosecutor) for the appellant.
Zahir Hussein Ahmad Shah (Zahirshah & Zulaiha Chiew) for the second respondent.

Sulong Matjeraie J:

[1] The two respondents were, at the material time, police officers: the first respondent being a Lance Corporal, L/Cpl Romanus Clement Ungkin ('Romanus') and the second respondent being an Inspector, Insp Rechi a/k John Chuhing ('Rechi'). They were both attached to the Crime Section of the Royal Malaysian Police, Federal Territory of Labuan. In the sessions court, Romanus faced two charges under s 11(a) of the Anti Corruption Act 1997: the first was against him alone while in the second charge he was charged jointly with Rechi. In the event, Romanus was convicted on the first charge and was sentenced to 14 days imprisonment and a fine of RM10,000 in default six months imprisonment. Both Romanus and Rechi were 'discharged and acquitted' on the second charge. It is against this decision that the Public Prosecutor is now appealing.

[2] The second charge reads as follows:

> That you both jointly on 20 October 1998 at around 3pm at Chow Shiu Mechanical Engineering Workshop, Lot B2, Jalan Arsat, in the Federal Territory of Labuan, as an agent of the Government of Malaysia, to wit a Crime Section Police Officer, Labuan Police Contingent Headquarters, in furtherance of a common intention, did corruptly receive for yourself gratification, to wit a cash sum of RM740 from Chin Hong Kin as an inducement for forbearing to take any legal action against CHIN Hong Kin who was said to have kept jackpot machines at Chin Hong Kin's workshop, and that you have thereby committed an offence under s 11(a) of the Anti Corruption Act 1997 and punishable under s 16 of the same Act (Laws of Malaysia No 575) and read together with s 34 of the Penal Code.

[3] Essentially Romanus and Rechi were jointly charged that they had acted with a common intention in receiving a sum of RM740 from the Chin Hong Kin on 20 October 1998 at his workshop as an inducement for forbearing to take any legal action against the complainant who was said to be in possession of jackpot machines.

[4] The submission of the deputy public prosecutor is at encl 22 and this was read in full by him to the court.

[5] Two significant points need to be mentioned here and these are as follows:

(1) the first respondent who was on bail failed to appear at all our hearings. His learned counsel, Mr Rakhbir Singh could not reach him and consequently he was unable to get any instruction. He asked to be discharged and since there was no objection either from the learned deputy public prosecutor representing the appellant, or the learned En Zahir Hussin

Ahmad Shah counsel for the second respondent, I allowed the request. In the meantime, a warrant of arrest was issued against the first respondent. With the concurrence of both parties, the appeal against the second respondent had to go ahead considering that he was a suspended Government officer there is a need to proceed on such cases expeditiously as after all the second respondent was charged on 9 September 1999, more than five years ago;

(2) learned counsel for the appellant applied for an amendment to the petition of appeal. After hearing arguments from both sides, 1 declined to grant the application for a number of reasons which include *inter alia*:

(a) notice of motion was not initially served on to learned counsel for the second respondent and when it was finally served only two days notice was only given during which time the submission of the learned counsel for the second respondent had been prepared and delivered to this court;

(b) following the decision in *Jumari bin Mohamed v Public Prosecutor* [1982] 1 MLJ 282 which provides that such amendment should not be granted as a matter of course but on very exceptional circumstances as per Tee Ah Seng J in *Dyca ak Rawing v Public Prosecutor* [1998] 1 LNS 345;

(c) some eight months delay in the filing of the application to amend the petition of appeal;

(d) such application should be allowed in order that substantial justice may be done, see *Veerasingam v Public Prosecutor* [1957] 1 LNS 93 but I found that the ground for the delay in filing the application was not explained in the affidavit of learned counsel En Amir Hadi bin Abdul Hadi deposed on 12 April 2004;

(e) and finally I am unable to find any exceptional circumstances to allow such application.

[6] Eight main points of appeal were raised in the petition of appeal but paras 4.2 and 4.8 are combined together by the learned deputy as he claimed that they deal with the same issue of corroboration. I shall however consider them in full below.

I THAT THE LEARNED SESSIONS COURT JUDGE ERRED IN LAW AND IN FACT WHEN SHE ACQUITTED AND DISCHARGED BOTH RESPONDENTS AFTER THE DEFENCE HAD BEEN CALLED.

[7] Learned deputy is dissatisfied that both respondents were acquitted and discharged despite the prosecution having proved their case beyond any reasonable doubt. As an example, he highlights what PW1 Chin Hong Kin testified at p 6 para 3 of the appeal record:

Lee tengok-tengok poket saya. Saya kata saya cuma ada duit RM740. Lee kata ini salah boleh denda tinggi. Saya kasi keluar itu duit dari poket dan kata saya cuma ada RM740. Saya jalan dekat sama Rechi saya hulurkan tangan saya dengan duit dan Rechi sambut duit itu. Rechi simpan duit itu dalam kotak rokok. Duit tujuh keping RM100 dan empat keping RM10. Saya ada buat catitan no. serial duit itu masa balik ke workshop. Sebelum sampai ke workshop saya sudah buat catitian serial number duit itu. Tulis atas sekeping kertas.

[8] It was suggested by the learned deputy that two elements are present from the above testimony. Firstly PW1 gave the money to the second respondent in the presence of the first respondent and secondly the serial numbers of the said moneys were jotted down by PW1 before handing them over to the second respondent. Learned counsel testified that this testimony was corroborated by PW2 – Chung Chen Fook and invited the attention of this Court to look at p 22 of the appeal record. However upon perusal of the evidence of all the witnesses, doubts arose when PW1 could not firmly state to whom he had handed over the money and why he did so when he was clearly of the view that he had not broken the law pertaining to the jackpot machines. Contrary to the submission of the learned deputy, PW1's story finds no support from the only witness at the scene, ie PW2 who testified that he did not see or hear anything that transpired in the container! In the end, the learned sessions court judge was left in a real state of doubt as to who among the accused persons had received the money from PW1, if at all either one of them had received it.

[9] The full amount of RM740 and the cigarette box ('Kotak Rokok') where Rechi was alleged to have put the money in, the subject matter of the charge were never recovered.

[10] The learned sessions court judge also entertained doubt that PW1 had written on a piece of paper ('P6') the serial numbers of the notes before he handed over the sum to either of the accused person. The word used by the learned judge was 'incredible' 'for PW1 to jot down serial numbers of bribe money even before meeting the two men who were said to be waiting for him at his workshop, and even before there was any kind of any bribe being asked from him'. P6 lost its evidential value when PW5 Abd Muneim bin Ibrahim himself testified that he was skeptical about P6 when he first received it from the complainant PW1.

[11] Doubt was also expressed by the learned sessions court judge with regards to the fact that PW4 Mohammad Soib bin Abdullah said he received a call from PW2 stating that two policemen were at the workshop asking for bribes being inconsistent with his action. It was her view that there appear to be no explanation given as to why PW4 failed to go to the workshop and apprehend the two policemen. Instead PW2 was asked to meet PW4 at a coffee shop!

[12] The learned sessions court judge accepted as the truth on the direct denial of Rechi to PW1 that he had ever received money from him. This was made only after the taped conversation P16B was tendered in court when it was her finding that when PW1 told Rechi that he had given RM740, Rechi's reply was 'ya ka' translated as 'is that so'.

[13] It can therefore be observed that the learned sessions court judge entertained serious doubts on the prosecution's case. It is settled law that even if the court does not believe the story of the accused but finds that his story or explanation has raised a reasonable doubt on the truth of the prosecution case or that the explanation was consistent with his innocence, the accused is entitled to an acquittal, see *Periasamy Sinnappan v Pendakwa Raya* [1996] 2 MLJ 557 (CA) and the oft-quoted case of *Mat v Public Prosecutor* [1963] MLJ 263 per Suffian J (as he then was). In this instant case not only did the learned sessions court judge entertain serious doubts but the reply made by Rechi was acceptable to her. It could be seen here that although it was the contention that the prosecution has proved its case beyond any reasonable doubt, the judge did not share this view. She entertains doubts and it has been explained why and is based substantially on the credibility of witnesses called. Such being the case, this court must be slow to disturb the findings of a trial judge unless such findings were plainly wrong or against the weight of evidence; see *Public Prosecutor v Abdul Rahman Mohamad* [2005] 1 CLJ 700. Here I am not convinced that the decision of the learned sessions court judge is wrong. In such circumstances, I rule that the appellant fails in para 4.1 of their petition of appeal.

II PARAGRAPH 4.2 OF THE PETITION OF APPEAL — THE LEARNED SESSION COURT JUDGE HAD ERRED IN LAW AND IN FACT WHEN SHE MADE AN UNJUSTIFIABLE INFERENCE PERTAINING TO THE SCRIBBLED NOTE P6 WHEN IN FACT P6 IS PROOF THAT THE RM740 WAS RECEIVED BY RESPONDENT

PARAGRAPH 4.8 OF THE PETITION OF APPEAL — THE LEARNED SESSIONS COURT JUDGE ERRED IN LAW AND IN FACT THAT SHE FAILED TO CONSIDER THE TESTIMONY OF THE COMPLAINANT PERTAINING TO P6 AND THE MEETING WITH BOTH RESPONDENTS

[14] As indicated earlier, the learned deputy said that he will submit on these two items in the petition of appeal together as he was of the view that both of them touched on the issue of corroboration.

[15] Learned deputy believes that P6, the list showing serial numbers of the money prepared by PW1, is 'so material as it could have proven that the money, ie RM740 was actually received by the respondents. And also, regarding the PW2's evidence that the appellant believes it to corroborate the PW1's evidence in preparing the P6 as well as the meeting with these two respondents on that very day'.

[16] It was the submission of the learned deputy that the true fact regarding the content of P6 failed to be considered by the learned sessions court judge who was alleged to be more concerned with the physical aspect of the evidence 'rather than to appreciate more the existence of the P6 as well as the P7 ie the RM100 note that was later found during search done by the ACA on the second respondent'.

[17] To begin with, I believe the allegation that RM100 bill ie P7 is incorrect. I have gone through the entire Notes of Proceeding and the appeal record and I am unable to find anything to substantiate the allegation that P7 was found on the second respondent during a search done by ACA.

[18] I am however of the view that the learned sessions court judge was entitled to entertain doubts as to whether P6 was written by PW1 before he purportedly handed over the sum of RM740 to either one of the respondents. P6 was allegedly made in the car prior to reaching the Workshop and prior to meeting both respondents. She therefore found it incredible bearing in mind that PW1 had stated in his testimony that the machines were not his and that these machines were old and damaged. Surely the learned sessions court judge was entitled to her doubts when even PW5, the ACA officer himself had entertained doubts pertaining to it when he said at p 49 of the appeal record as follows:

> Atas RM740 ini tidak ada tangkapan dibuat atas kedua-dua polis tersebut. Tidak buat tangkapan oleh kerana masih ragu-ragu kewujudan transaksi tersebut. Keraguan muncul walaupun P6 diberi tetapi saya tidak dapat verify. Setuju saya berwaspada tentang prihal RM740 oleh kerana tanpa bukti takut nanti ini Cuma penganiayaan.

[19] The learned deputy argued that there was sufficient corroboration that RM740 was received by the second respondent. He suggested that there was direct evidence through PW1 but 'also had given other kind of corroboration for instance like the P6 and P7.'

[20] It was suggested that PW1 during cross examination said: 'Memang Rechi (OKT2) yang ambil wang yang saya katakan'. Then, the learned deputy submitted that this was supported by PW5 at p 49 of the appeal record where it is stated as follows: 'Masa kedatangan saya PW1 kata dia baru saja serah duit sebanyak RM740 … Ada dia bagi tahu pada saya yang dia telah bagi RM740 kepada Insp Ritchie ('OKT2'), … Bukti yang dapat saya nyatakan di sini cuma P6 yang PW1 beri kepada saya'. I suggest that the testimony of PW5 here is mere hearsay.

[21] Learned deputy invited my attention to p 22 of the appeal record on the evidence of PW2. The extract that he wanted me to examine is para 3 which says *inter alia*: 'SP1 berjumpa dengan dua orang. OKT1 dan 2. Semasa saya nampak dua orang ini saya tahu siapa dua orang SP1 yang memberitahu kepada saya … Mereka bercakap lebih kurang 20 minit.' However I note from

the same paragraph PW2 also testified that 'Saya tidak dengar apa- apa mereka cakap kerana saya berdiri jauh daripada mereka … lebih kurang 15 kaki'.

[22] At p 23 of the appeal record PW2 said 'Saya tidak nampak SP1 beri wang kepada polis'.

[23] It is observed here that the learned sessions court judge had considered all the evidence as at p 137 appeal record she said she had 'conducted a maximum evaluation of the credibility of the prosecution witnesses' and at p 150 of the appeal record she said 'upon hearing all submissions made available to me'. Items 4.2 and 4.8 of the petition of appeal are also rejected.

III THE LEARNED SESSIONS COURT JUDGE ERRED IN LAW AND IN FACT WHEN QUESTIONING THE CREDIBILITY OF PW1 IN RELATION TO P6 BUT HAD ACCEPTED HIS TESTIMONY ON OTHER MATTERS

[24] On this item, learned deputy invited this court to consider p 148 of the appeal record which says as follows:

> On the issue of whether P6 was written by PW1 before he handed over the sum to either of the accused persons, I am in real doubt after hearing PW5 himself testifying that he was skeptical about it. Furthermore, as argued in submission by learned counsel for the second accused, I find it more incredible for PW1 to jot down serial numbers of bribe money before meeting the two men who were said to be waiting for him at his workshop, and even before there was any hint of any bribe being asked from him by the accused persons. On top of that, it was PWl's own testimony that the machines did not belong to him and were not slot machines but were only video game machines and were old and damaged. That being the case, I find it incredible for him to have entertained any real thoughts of giving the two men waiting at his workshop bribes even before he heard what they had to say.' After saying this, the appellant submits that at another instance, the learned sessions court judge believes what PW1 said with regards to the sum of RM740 being handed over to one of the respondents when he quoted a passage in the judgment at p 149 of the appeal record which says: 'In the end I am left in a real state of doubt as to who among the accused persons received the money from PW1 on 20 October 1998, if at all either one of them had received it.

[25] It is the submission of the learned deputy that the writing down of the serial numbers before RM740 was handed over was not something impossible to do and further he has a friend like PW4 Mohd Soib Abdullah, an ACA officer.

[26] Again the learned deputy submitted that what was overlooked was that P7 'was found later with the second respondent, this is not only the strongest evidence that can show to the court that the money was (sic) changed hand to the second accused on the 20 October 1998 but also strengthened the evidence of PW1 regarding the money had been given to the second respondent in the present (sic) of the first respondent on that day.

[27] On the issue of whether the learned sessions court judge had erred when on the one hand she questioned the credibility of PW1 in relation to P6 yet accepting his testimony on other matters, I am of the view that there is no rule of law must be believed in its entirety or not at all for good and cogent reasons. The Federal Court in the case of *Dato' Seri Anwar Ibrahim v Public Prosecutor* [2002] 3 MLJ 193 referred to and agreed with the judgment of Raja Azlan Shah FJ (as His Highness then was) in *Public Prosecutor v Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15 which pertains to this issue where it says that 'There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all. A court is fully competent, for good and cogent reasons, to accept one part or the testimony of a witness and to reject the other'. After reading through the judgment of the learned sessions court judge and the entire appeal record as well as after pursuing the submission of the learned counsel for the second respondent at encl 12, I am convinced that there is no good reason for me to disagree with her findings especially so considering that the story of PW1 is riddled with elements of inherent improbabilities. Some examples of these are: (1) PW1 was able to copy the serial numbers of bank notes onto a thin piece of paper while the car was moving; (2) At p 6 of the appeal record PW1 appear to contradict himself when he said firstly 'Saya ada buat catitian no serial duit itu masa balek ke workshop' and then he said 'Sebelum sampai ke workshop saya sudah buat catitian serial nombor duit itu'. The translation is: first when he was back at the workshop, second before he reached the workshop. No clarification was made as to when exactly did he write them; (3) PW1 failed to mention anything pertaining-to P6 in his report to the Badan Pencegah Rasuah on 22October 1998 at 10.15am when he was aware of the importance of P6; (4)PW1 was adamant that the machines were not his but owned by someone else and these were damaged video game machines and not jackpot machines and there was no reason for PW1 to offer the Policemen waiting at his workshop any bribe and why should he jump the gun in writing down the serial numbers of the money when he had not even been asked yet?; (5) The evidence of PW1 alleging that he had written the serial numbers down was not supported by any evidence and the court could not place any reliance to the testimony of PW2 for although he claimed that he saw PW1 jotting down some numbers from the bank notes, he could not remember if he asked PW1 what he was doing. No evidence was offered what or where PW1 jotted the numbers down. He neither described the piece of paper on which the numbers were alleged to have been scribbled on nor was PW2 asked to identity that piece of paper in court.

[28] This ruling applies to item 4.5 of the petition of appeal as well where the ground of appeal argued on the same question of accepting one part of the testimony of PW4 and rejecting the other. Apart from saying that the court is at liberty to accept the testimony of a witness in certain matter and is also entitled to reject his testimony on other matters. This is particularly true

where the learned sessions court judge was right in finding that the action of PW4 is inconsistent with the fact that he had just received a phone call from PW2 telling him that there were two policemen at the workshop of PW1 asking for bribes. Instead of rushing to the workshop to prevent the commission of an offence or to arrest the policemen, PW4 told PW2 to meet him at a restaurant. No explanation was given as to why PW4 having been told that the policemen in the workshop had just received the bribe failed to rush there taking into account that PW1 had testified the policemen were in the workshop for about 1/2 an hour after receiving the bribe, see p 7 of the appeal record. I therefore feel that it was proper for the learned sessions court judge to entertain her suspicions pertaining to the action of PW4 for firstly he could have acted promptly in going to the scene of the crime when the respondents were still there and secondly in the event that he was late in getting to the workshop, a manhunt for the two policemen could be immediately launched as Labuan is not a particularly a big place. By doing so PW4 could have verified the story of PW1 if the money recovered from either of the respondents matched the serial numbers given. In the event PW4 failed to do so and appear to be rather slow to reach as he did not even take down the report from PW1 on the same day. The report was made only on 22 October 1998, after a lapse of two days.

[29] Further, it is interesting to note that the testimony of PW4 pertaining to the telephone conversation he had with PW2 runs foul to the testimony of PW2. While PW2 said at p 22 of the appeal record:

> SP1 menyeru saya pergi telefon kepada Mohd. Saya kenal Mohd Ketua Jabatan BPR. *Saya tak tahu kenapa SP1 suruh telefon Mohd. Saya telefon Mohd. Menggunakan telefon atau no 0108820920. Mohd sendiri* menjawab … kawan sava ingin cari kamu. perlukan kamu'. (Emphasis added.)

The testimony of PW4 at p 30 of the appeal record says:

> 20 Oktober 1998 bertugas di BPR, Labuan sebagai Ketua Cawangan BPR Labuan. Jam 3.30pm hari yang sama saya terima satu panggilan telefon daripada satu lelaki Cina nama Ah Fook berkata ada *dua anggota polis datang ke workshop rakannya di ..Jln Arshad. Kedua-dua anggota polis mahu rasuah daripada rakannya kerana mendakwa rakannya menyimpan mesin judi jackpot.*

[30] It is extremely interesting to observe here that whilst PW2 said he *does not know why PW1 (SP1) asked him to call Mohd*. It is understandable that he said '*kawan saya cari kamu, perlukan kamu*'. P4 on the other hand said he received a call from PW2 who said that two policemen came to his friend's workshop and asked for bribes to be paid as they alleged that his friend had jackpot machines!

[31] Looking at these two testimonies, I understand why and am in total agreement with the learned sessions court judge in questioning the credibility of PW4 with reference to the phone call made by PW2 to him. As such both grounds of appeal under items 4.3 and 4.5 are unsustainable.

IV THE LEARNED SESSIONS COURT JUDGE HAD ERRED IN LAW AND IN FACTS WHEN SHE FAILED TO ADEQUATELY CONSIDER AND EVALUATE THE TESTIMONY OF PW1 PERTAINING TO THE DEMAND OF BRIBES BY THE RESPONDENTS ESPECIALLY WITH REGARDS TO THE TAPED CONVERSATION P16B WITHOUT CONSIDERING THE REST OF THE PROSECUTION'S EVIDENCE.

[32] It is the contention of the appellant that the taped conversation P16B was not the only evidence that the prosecution had against Rechi. It was submitted that the prosecution have shown that Rechi was the one who received the money from PW1 on 20 October 1998 and this was in the presence of Romanus. P6 was prepared earlier by PW1 and it was further submitted that P7 (the RM100 bill) was found in Rechi's possession. Therefore it was the submission of the appellant that the phrase 'the only real evidence' in describing the evidence of the prosecution is unsuitable.

[33] It could be observed at p 150 appeal record that the learned sessions court judge specifically touched on the issue of the RM740 when it is stated as follows:

> On the issue of RM740, after hearing the explanation from the 2nd accused and upon hearing all submissions made available to me, I am of the opinion that the prosecution has failed to prove that the money was accepted by either of the accused persons.

[34] I feel that when one says that one has considered all the submissions, it means all the matters pertaining to the RM740 had been considered as all submissions are based on the evidence adduced or the lack of it. The taped conversation P16B had contradicted the testimony of PW1 in respect of the RM740 and the relevant part of the transcript is reproduc ed hereunder:

> Complainant (PW1): Saya sudah kasi 740 ringgit eh.
>
> Rechi: Ya Ka?

[35] The explanation in respect of the above transcript was duly accepted by the learned sessions court judge. I have no reason to disagree with such finding as 'ya ka?' means in simple Malay 'is that so?'

[36] The other explanations made by Rechi were also acceptable to the learned sessions court judge and that when entrapments were laid on Rechi, none of them produced positive result to the ACA confirming in the eyes of the learned judge that Rechi was not a man who would succumb to bribes.

[37] Learned counsel for Rechi argued that there were other matters that could have raised doubt as to the RM740 being received by Rechi and these include *inter-alia*:

(a) The non production of the RM740 as a prosecution exhibit;

(b) The 6 traps laid down by ACA to entrap Rechi; all of which failed;

(c) That the only testimony pertaining to the RM740 came from PW1 and his testimony was not even supported by PW2 who appeared to have stood only five feet away from Rechi when Rechi was at the Container that day, yet PW2 did not see anything about the money being handed over;

(d) PW1 could not make up his mind as to who had received the RM740: whether it Rechi or Romanus makes the story with respect to the RM740 highly suspect. At p 6 of the appeal record PW1 states that he gave the RM740 to Rechi but in his report at P2b to the ACA PW1 said he handed the money to both respondents. However, PW5 at p 45 said that the RM100 was recovered from Romanus;

(e) The learned prosecutor appears not to believe its own key witness with regards to the sum of RM740. When Romanus was cross-examined at p106 appeal record, instead of putting to him that he had acted with common intention with Rechi when Rechi had received RM740 from PW1 it was PUT to Romanus that he was the one who received RM740 from PW1 and when Rechi was cross-examined at p 123 of the appeal record, it was PUT to Rechi that it was he who had received the RM740;

(f) Rechi could have been a victim of a scheme to even up the score by testifying falsely that PW1 had given him RM740 as it was Rechi who had arrested the complainant on 24 October 1998 for a gaming offence and secondly PWl's brother have had a brush with the law previously where he suffered the humiliation of having a bullet stuck at his buttock from a shot fired be a policeman.

[38] I am therefore of the view that the learned sessions court judge had evaluated and adequately considered the testimony of PW1 and was of the considered view that Rechi was not a man that will succumb to bribes. It was also her finding that the explanation offered by Rechi in respect of the taped conversation was acceptable as the truth of the matter in that Rechi denied directly to PW1 that he had ever received the RM740. From the various testimonies given and the submission made in this case, I am in agreement with her findings.

V THE LEARNED SESSIONS COURT JUDGE ERRED WHEN SHE PLACED TOO MUCH EMPHASIS ON THE DISCREPANCIES BETWEEN PWL'S REPORT TO THE ACA AND HIS TESTIMONY IN COURT WITH REGARDS TO WHICH RESPONDENT HAD RECEIVED THE RM740 WHEREAS BOTH RESPONDENTS WERE CHARGED WITH A COMMON INTENTION PERTAINING TO THE RM740 AND BOTH WERE PRESENT WHEN THE MONEY WAS HANDED OVER BY PW1.

[39] Learned deputy alleged that the learned sessions court judge was unnecessarily concerned with the determination as to whom RM740 was handed over to whereas both of them were charged with a common intention, the

effect of which is obvious. It was his submission that the evidence found at p 6 of appeal record from line 5 from the top to line 23 thereof, reveals how both respondents were involved in the crime. It was also submitted that the learned judge was silent and made no finding as to the effect of s 34 of the Penal Code.

[40] Contrary to the allegation, the issue of common intention was surely considered by the learned sessions court judge at the end of the prosecution's case when she ordered both respondents to enter their defence. However doubts crept in after she heard the defence case and relate them back to the earlier evidence. As a result she even entertained doubt if at all RM740 was ever given since PW1 had contradicted himself when his testimony was compared with the ACA report lodged. This matter was made worse when the learned DPP who handled the case at the trial stage was equally at a loss when she puts the matter to both respondents as to received the RM740 in the following manner:

(a) At p 106 of the appeal record, the learned DPP puts to Romanus:

'Pada 20 Oktober 1998 kamu telah menerima sebanyak RM740 daripada Chin?;

(b) At p 123 appeal record, the learned DPP puts to Rechi:

'Saya katakan kamu terima wang RM740 sebagai dorongan tidak menga mbil tindakan terhadap PW1?;

(c) At page 124 appeal record, the learned DPP again questioned Rechi:

'Wang RM740 yang kamu terima daripada PW1 ialah dalam bentuk note RM100 dan RM10?'

[41] Doubts were caused with the above line of questioning to both respondents. This would have been avoided if the learned DPP had put it to Romanus that Rechi had received the money from PW1 in his presence and he had acted with a common intention when Rechi received the said money. This was not however done but it was PUT to both Romanus and Rechi if the money was received by each one of them.

[42] In my view therefore the learned sessions court judge had rightly entertained doubts in respect of the impugned RM740 bearing in mind that Rechi had flatly denied receiving any money from PW1 in the taped conversation. This matter was made more difficult when the learned DPP herself was unsure of the facts of her own case.

[43] Admittedly both respondents would be guilty if one of them had received the money with the common intention of the other. However what transpired in this case was that at the prosecution stage, the prosecution started out with the notion that PW1 handed the money to Rechi in the

presence of Romanus but at the defence stage, the prosecution created doubts by shifting their own version with regards to the RM740. The end result was that by taking such a stance, it adds more 'clouds' to the already existing doubts in the mind of the learned sessions court judge who has misgiving as to whether in the first place the sum of RM740 was ever received by either of them.

[44] Therefore the appeal on the basis of this ground is also unsustainable.

VI THE LEARNED SESSIONS COURT JUDGE ERRED IN LAW AND IN FACTS WHEN SHE FAILED TO CONSIDER THAT IF THE RM740 HAD CHANGED HANDS, THEN THE STATUTORY PRESUMPTION UNDER S 42 ANTI CORRUPTION ACT BECOME APPLICABLE

[45] It is the contention of the learned deputy public prosecutor that the learned sessions court judge fell into a serious error when she states in her judgment that 'I am of the opinion that the prosecution has failed to prove that the money was accepted by either of the accused persons. In line with the authority in *Attan bin Abdul Gani v Public Prosecutor* [1969] 1 LNS 112, I am of the opinion that the presumption under s 42(1) does not apply and hence the defence is not required to prove anything to the contrary'.

[46] Regretfully I do not share the view held by the learned deputy. I am of the view that the learned sessions court judge had rightly considered this point of law with precision in that a statutory presumption can only be invoked upon proving the matter that invokes the presumption. The learned sessions court judge is not satisfied that the prosecution has proved that PW1 had given the impugned RM740 to either one of the respondents, and then the statutory presumption cannot be invoked, see *Attan bin Abdul Gani v Public Prosecutor*.

[47] Heliliah Mohd Yusof J discussed in greater detail on how such presumption may be invoked in *Zabidi bin Morad v Public Prosecutor* [2003] MLJU 607. Quoting from a passage in the decision of Chang Min Tat J (as he then was) in *Public Prosecutor v Ooi Seng Huat* [1968] 2 MLJ 168 who said: 'Now as a matter of law a presumption is a statutory invention that *upon the proof of a fact an inference of another fact can be drawn.*' (Emphasis is mine.) This was further explained by Thomson CJ (as he then was) in *Ng Kim Huat v Public Prosecutor* [1961] MLJ 308, 309 when he said: 'It is surely elementary to observe that while a statutory presumption when it arises may operate in place of evidence and so reverse the onus of proof on any point, *the bare potential existence of such a presumption cannot itself dispense with proof of any fact the existence of which is a condition precedent of the presumption arising'*.

[48] Heliliah J further adds that 'The condition precedent that it to be established for purposes of permitting the presumption in s 14 of the Act to be invoked is that there is evidence to establish that a person is found in possession, custody or control of any newspaper contrary to sub-s 5(1) or (2)

of the Act. This clearly also shows that on the principle of exclusio unius alterius the presumption cannot also be invoked for something that is not found sub-s 5(2)(b) namely that there is no offence of mere possession. Possession or custody or control of a newspaper must be for any or some of the objects stated in para (a) or (b) of sub-s 5(2) as the case may be. The presumption could not therefore have been invoked'.

[49] It would appear to me that the learned sessions court judge was correct in holding that the presumption under s 42 of the Act could not be invoked in this case as the prosecution had failed to prove the condition precedent in order to invoke the said presumption, ie that either the respondent had received the impugned RM740.

VII THE LEARNED SESSIONS COURT JUDGE ERRED IN LAW AND IN FACT WHEN SHE FAILED TO CONSIDER THE TESTIMONY OF PW2 AS THE TESTIMONY OF AN INDEPENDENT WITNESS WHO COULD CORROBORATE THE TESTIMONY OF PW1 PERTAINING TO P6 AND THE MEETING WITH BOTH RESPONDENTS.

[50] When the learned sessions court judge have conducted a maximum evaluation of the credibility of the prosecution witnesses and that she had heard all the submissions made, it means that the learned judge has considered all the evidence in the case. Further naturally it means that she has considered how the testimony of PW2 did not support the testimony of PW1 in malarial factors. These include the following:

(a) PW2 said that be saw PW1 jotting down some numbers front aortw bank notes but he could not remember if he asked PW1 what he was doing. He also never offered any evidence on where or on what PW1 jotted the numbers down. PW2 did not even describe the piece of paper let alone identify the same in court, see p 21 of the appeal record;

(b) PW2 stated that he did not see PW1 giving any money to the police. When his evidence is read back upon hearing the testimony of the second accused — Rechi — who said that PW2 was standing only about five feet away from: hint when Rechi was in the container, it establishes the fact that PW1 was not telling the truth when he said that he gave the money to Rechi. Surely PW2 would have seen if it is true that RM740 was in fact handed over to Rechi, see p 23 appeal record;

(c) At p 22 of the appeal record, PW2 testified that when he arrived back at the workshop with the two ACA officers, PW1 told him that the police 'mengambil' and 'meminta' more than RM700. Firstly there is uncertainty as to what PW1 had laid as the meaning of the words 'mengambil' and 'meminta' are distinct. Secondly, PW1 appear to have failed to notify the ACA officers of the serial numbers of the bank notes ('bills') that he had jotted down. This appears odd considering that this is such an important matter;

(d) According to PW2 when he called the ACA officer (PW4), the two policemen were still at the said workshop, see p 22 of the appeal record. It is an irony that the ACA officer, bearing in mind their functions and duties did not immediately go to the container and arrest the two police officers. Instead according to PW4 at p 30 of the appeal record a meeting was arranged later in the afternoon. This does not make much sense.

[51] As could be observed, I have addressed this part of the petition of appeal at para 2 earlier when I disposed off with items 4.2 and 7.8 together and for fear of repeating myself, which I believe I have done on several occasions earlier, I just wish to recapitulate the legal position regarding the reluctance of appellate court in disturbing the factual findings of the trial judge unless it is convinced that the decision was plainly wrong or was against the weight of evidence. Tengku Baharudin Shah JCA said: 'The functions of an appellate court in an appeal from the decision of a trial judge, which decision was based on his opinion respecting the credibility and trustworthiness of the witness he saw are limited in their scope and character. In order to reverse, the appellate court should not merely entertain doubts as to whether the decision below is right, but must be convinced that it is wrong'. (see *Public Prosecutor v Abdul Rahman Mohamad* [2005] 1 CLJ 700 at p 707).

[52] It is in the spirit of this decision and other decided cases outlined earlier that I have considered this appeal. After perusing the petition of appeal, the submissions of both counsel and the authorities filed herein, regretfully I have to say that I see no merit in the appeal. I therefore confirm the decision of the learned sessions court judge and that the second respondent Mr Rechi a/k John Chuhing is hereby discharged and acquitted of the second charge. The appeal is dismissed.

Appeal dismissed.

Reported by Peter Ling